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No. 87-7

(3)

IN THE
Supreme Court Of The United States
October Term, 1987

FREDRIC E. and ADRIAN MICHELS; ROBERT and
TERESA KLEIN; RICHARD and PAMELA RECEVEUR
and McKINLEY and WILMA THURMAN,
Petitioners

versus

TIMES MIRROR CABLE TELEVISION OF LOUISVILLE,
INC.; STORER COMMUNICATIONS OF JEFFERSON
COUNTY, INC.; LOUISVILLE GAS & ELECTRIC
COMPANY and SOUTH CENTRAL BELL
TELEPHONE COMPANY,
Respondents

**RESPONSE OF SOUTH CENTRAL BELL
TELEPHONE COMPANY TO PETITION FOR
WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY**

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JURISDICTION

South Central Bell does not agree that this Court's jurisdiction can be invoked pursuant to 28 U.S.C.A. § 2101 (c) (West 1982) and Rule 20.2, as Petitioners allege. The statute and rule only provide jurisdictional time requirements for filing petitions, not jurisdiction to review the matters raised. As argued below, South Central Bell does not believe this case presents questions within the Court's jurisdiction.

COUNTERSTATEMENT OF THE CASE

Petitioners are four couples who are subscribers to cable television services. Despite their voluntary acceptance of these services, and their signed agreements to allow the Community Antenna Television (CATV) companies to enter their property, petitioners filed this action contending that Times Mirror and Storer (the CATV companies serving the Louisville and Jefferson County, Kentucky area) have trespassed on their residential lots by placing certain cable television facilities in the easements which serve their properties. While objecting to some of the facilities, Petitioners do not object to the service wire, or drop line, which brings the cable television signal into their homes.

In addition, Petitioners sued Louisville Gas and Electric ("LG&E") and South Central Bell Telephone Company ("South Central Bell") for trespass. Petitioners do not contend that LG&E or South Central Bell¹ lack the right to place their respective electric and telephone facilities within the easement boundaries. Rather, Petitioners contended that LG&E and South Central Bell trespassed on their realty by granting the CATV Respondents the right to attach to their facilities.

South Central Bell has allowed and does allow CATV companies (including Times Mirror and Storer) to attach their CATV facilities to South Central Bell's facilities on the condition, among others, that all other necessary public and private authority has been obtained. As the language of the documents which grant this permission conclusively shows,² South Central Bell makes no attempt to convey any interest in Petitioners' realty. The only interest conveyed by South Central Bell is the license to the CATV companies to attach to South Central Bell facilities. Thus, attachment is authorized only where entry and presence is authorized.

¹The statement required by Rule 28.1 is contained in the Appendix, p. A-1.

²The pertinent language of the tariff and agreement is set forth in the Appendix, p. A-5.

On these facts, the trial court found that Petitioners had consented to the presence of CATV facilities. The Court of Appeals of Kentucky affirmed on different grounds, finding that the subdivision-type easements which serve Petitioners' lots were apportionable to cable television use. The Supreme Court of Kentucky also affirmed, finding, like the trial court, that Petitioners had consented to the presence of CATV facilities.

ARGUMENT

I. The questions presented by Petitioners are not federal questions. Even if construed as federal questions, they are answered on independent and adequate state grounds.

Petitioners pose three questions:

1. Did Petitioners consent to the placement of CATV distribution cable on their land when they timely objected to trespass within the statute of limitations?
2. Are electric and telephone easements unilaterally apportionable to new uses or new users such as CATV?
3. Is CATV a utility?

These questions are not federal questions. To demonstrate the obvious, this Court's jurisdiction over state court judgments is governed by 28 U.S.C.A. § 1257 (West 1966 & Supp. 1987), which grants the Court certiorari jurisdiction "where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." Even a strained interpretation of this language will not bring the questions presented by Petitioners within its terms.

Petitioners' first question is difficult to interpret. Shed of its relational verbiage, it says: "Did Petitioners consent when they objected?" Fairly interpreted, it appears to present the question of whether Petitioners authorized entry to their property. Both the trial court and the Supreme Court of Kentucky an-

swered the question. Petitioners did authorize the presence of CATV facilities. In so holding, the courts relied upon Kentucky law. As the Supreme Court of Kentucky's Opinion shows,³ it followed the Kentucky Rule enunciated in *Bradford v. Clifton, Ky.*, 379 S.W.2d 249 (1964).

The second and third questions presented by Petitioners are also state questions. While the Supreme Court of Kentucky decided not to consider the questions, the Court of Appeals, relying upon established Kentucky law, found that the easements to which Petitioners' lots are subject were compatible with use by cable television. Kentucky law has long held that easements are susceptible to uses of contemporary technology, see *Cumberland Telephone & Telegraph Company v. Avritt*, 120 Ky. 34, 85 S.W. 204 (1905), and that cable television has the "attributes" of a public utility. *City of Owensboro v. Top Vision Cable Company*, 487 S.W.2d 283, 287 (Ky. 1972).

The questions arise from the tort case of trespass to land alleged and argued by Petitioners to three Kentucky courts, all of which ruled against Petitioners on grounds provided by state law. Questions under the Constitution, treaties, statutes or authority of the United States were not presented. Because the state courts have simply applied state law to state questions, the Petition does not raise a federal question within the jurisdiction of the Court. *Agins v. City of Tiburon*, 447 U.S. 255, 65 L. Ed. 2d 106, 111 n.6, 100 S. Ct. 2138 (1980).

II. Mentioning the Fifth Amendment in the Petition for Rehearing to the Supreme Court of Kentucky does not properly or timely raise it before this Court.

The Court's Rule 21.1(h) requires that Petitioners show that federal questions were specifically, properly and timely raised. As demonstrated by the Petition itself, Petitioners did not mention the Fifth Amendment until their Petition for Rehearing before the Supreme Court of Kentucky.⁴ This Court

³Petitioners' Appendix, p. 3a.

⁴Petition, p. 4.

does not consider issues raised for the first time in a state Supreme Court brief, *Exxon Corp. v. Eagerton*, 462 U.S. 176, 76 L. Ed. 2d 497, 504 n.3, 103 S. Ct. 2296 (1983), nor does Kentucky procedure permit such consideration. *Kentucky Milk Marketing and Antimonopoly Commission v. Kroger Company*, 691 S.W.2d 893, 901 (Ky. 1985).

Nor did Petitioners raise a taking issue during the course of the case. Their descriptions of the case in the Introductions⁵ to each of their principal appellate briefs show that their allegation was one of trespass:

Court of Appeals

INTRODUCTION

The Appellants sought trespass damages for location of CATV cable and appurtenances in the public utility easements on their property and sought a class action. On cross-motions for summary judgment the Appellees were granted summary judgment, and Appellants appeal this Order and the denial of Appellants' Motions for Summary Judgment.

Supreme Court

INTRODUCTION

The Movants seek trespass damages for location of CATV cable and appurtenances in the public utility easements on their property, and appeal from Judgment of the Court below which found public utility easements to be appportionable and found CATV operators to be public utilities. The decision of the Court below affirmed Summary Judgment of the lower court, but affirmed on different grounds.

Kentucky procedural rules also require a Statement of Points and Authorities which are to set forth succinctly the contentions of a party respecting issues of law. Ky. C.R. 76.12 (c)

⁵Kentucky procedural rules require appellant/petitioner briefs to begin with an Introduction describing the nature of the case. Ky. C.R. 76.12 (c) (4) (i).

(4) (iii). As their Statements⁶ in the same briefs reveal, Petitioners were not alleging a taking.

Even without the procedural failures noted above, Petitioners' apparent new claim that the private persons they have sued deprived them of constitutional privileges is unfounded. The authority⁷ now cited by Petitioners properly stands for the general proposition that governments owe citizens obligations and privileges guaranteed by the United States Constitution, but the authority is not applicable to this dispute between citizens.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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⁶The Statements of Points are set forth in the Appendix, p. A-7.

⁷All of the authority predates the filing of the Petitioners' first Complaint.

CERTIFICATE OF SERVICE

I certify pursuant to Supreme Court Rule 28 that three copies hereof were mailed, first class postage prepaid, this 22 day of July, 1987, to Mr. David Armstrong, Office of Attorney General, Capitol Building, Frankfort, Kentucky 40601, and to the following counsel of record: Mr. Marvin J. Hirn, 3300 First National Tower, Louisville, Kentucky 40202, Counsel for Times Mirror; Mr. John Bilby, 2500 Brown & Williamson Tower, Louisville, Kentucky 40202, Counsel for LG&E; Mr. Laurence J. Zielke, 450 S. Third Street, Louisville, Kentucky 40202, Counsel for Storer; Mr. Nicholas W. Carlin, 911 Kentucky Home Life Building, Louisville, Kentucky 40202, Counsel for Petitioners.

James G. Harralson
*Counsel of Record for
Respondent South Central
Bell Telephone Company*

APPENDIX

THE
LIBRARY
OF THE
MUSEUM
OF
NATURAL
HISTORY
AND
ZOOLOGY
OF
THE
CITY OF
NEW YORK
AND
THE
ADJACENT
ISLANDS
OF
STATEN ISLAND
AND
ROCKAWAY

APPENDIX

South Central Bell Telephone Company is a wholly-owned subsidiary of BellSouth Corporation. Listed below are the companies, and their subsidiaries, affiliated with BellSouth Corporation.

*Parent Corporation**Subsidiary*

BellSouth Corporation

Southern Bell Telephone
and Telegraph Company
South Central Bell Telephone
Company
BellSouth Financial Services
Corporation
BellSouth D.C., Inc.
BellSouth Enterprises, Inc.
BellSouth National Publish-
ing Incorporated

Augusta Cellular Corporation

American Cellular Communi-
cations Corporation

BellSouth Advanced Systems,
Inc.

BellSouth Personal Mobile
Communications Corpora-
tion
CommTel, Inc.

BellSouth Communications
Holdings, Inc.

BellSouth Communications,
Inc.

BellSouth Enterprises, Inc.

BellSouth Mobility, Inc.
BellSouth Advertising and
Publishing Corporation
Sunlink Corporation
BellSouth Systems Tech-
nology, Inc.
TechSouth, Inc.
BellSouth Advanced Systems,
Inc.

FiberLAN, Inc.
BellSouth International, Inc.
Graphics Holding Company
BellSouth Government
Systems, Inc.
BellSouth Ventures Cor-
poration
BellSouth Information Sys-
tems, Inc. (BIS)
L. M. Berry and Company
South Star Ventures, Inc.
American Cellular Communi-
cations Corporation
Dataserv, Inc.
BellSouth Communications
Holdings, Inc.
Tri Data Systems, Inc.

BellSouth International
Communications (U. K.)
Limited

Air Call Communications
(Holdings) Limited

BellSouth International,
Inc.

BellSouth International
(Asia/Pacific), Inc.

BellSouth Mobility, Inc.

Atlanta CGSA, Inc.
Florida Cellular Service, Inc.
New Orleans, CGSA, Inc.
Baton Rouge CGSA, Inc.
Alabama Cellular Service, Inc.
Chattanooga CGSA, Inc.
Jacksonville CGSA, Inc.
(merged into Florida
Cellular Service, Inc.)
Kentucky CGSA, Inc.
Memphis CGSA, Inc.
Nashville CGSA, Inc.
Orlando CGSA, Inc.

	South Carolina Cellular Service, Inc.
	Space Coast Cellular, Inc.
BellSouth Services Inc.	Bell Communications Research, Inc.
BellSouth Ventures Corporation	BellSouth Advanced Networks, Inc.
Compel Group Public Limited Company	Compel Public Limited Company
	Faxlease Limited
	Fenchurch Industrial Supply Company Limited
	Softlease Limited
Dataserv, Inc.	Dataserv BV
	Dataserv Computer Maintenance, Inc.
	Dataserv, Computer Wartungs-und Vertreibs-Gesellschaft m.b.H.
	Dataserv Equipment, Inc.
	Dataserv Finance and Leasing Limited
	Dataserv Financial Services, Inc.
	Dataserv GmbH
	Dataserv Incorporated Scandinavia AB
	Dataserv Incorporated Scandinavia ApS
	Dataserv Limited
	Dataserv Premier Limited
	Dataserv S.A.R.L.
	Dataserv S.p.a.
Dataserv Equipment, Inc.	PDS Financial, Inc.

Dataserv (Holdings)
Limited

Dataserv Limited

Graphics Holding Company

Graphics Merger Company

L. M. Berry and Company

Premier Computers Limited

South Central Bell Tel. Co.

Southern Bell Telephone
and Telegraph Company

Premier Computers
(Benelux) SA

Premier Computers GmbH

Compel Group Public
Limited Company

Dataserv (Finance) Limited

Dataserv (Holdings) Limited

Dataserv (Leasing) Limited

Premier Computers Limited

Graphics Merger Company

Stevens Graphics, Inc.

L. M. Berry and Company-
NYPS

L. M. Berry Services, Inc.

ITT World Directories, Inc.

Dataserv (P.O.S.) Limited

BellSouth Services Inc.

South Central Bell Advanced
Systems, Inc.

BellSouth Services Inc.

Southern Bell Advanced
Systems, Inc.

LANGUAGE FROM TARIFF AND AGREEMENTS

TARIFF 1F (Exhibit 3, South Central Bell Motion for Summary Judgment, T.R. Item 182)

Subject to the provisions of this tariff, the Company will authorize the attachment of an attachee's facilities to a pole or anchor or the placement of an attachee's facilities in a conduit system for the purpose of providing the services of a cable television system.

The other provisions include the following section:

Attachee shall be responsible for obtaining from the appropriate public and/or private authority any required authorization to construct, operate and maintain its facilities on such public or private property before it attaches its facilities to poles and anchors, or occupies conduit located on the same public and/or private property.

AGREEMENTS (Exhibit 5, South Central Bell Motion for Summary Judgment, T.R. Item 182)

Whereas, Licensor [South Central Bell] is willing to permit, *to the extent it may lawfully do so*, the placement of said cables, equipment and facilities in Licensor's poles where reasonably available . . . [preamble to agreement]

Subject to the provisions of this Agreement, the Licensor [South Central Bell] will issue to Licensee [CATV companies], for any lawful communications purpose, revocable, nonexclusive licenses authorizing the attachment of Licensee's cables, equipment and facilities to Licensor's poles and anchors . . . [Article II of Agreements]

Licensee [the CATV company] shall submit to Licensor [South Central Bell] satisfactory evidence of Licensee's lawful authority to place, maintain and operate its facilities within public streets, highways, and other thoroughfares and *shall secure any necessary permits and consents* from Federal, State, County and Municipal authorities and *from the owners of*

property to construct, maintain and operate facilities at the locations of poles and anchors of Licensor which it uses
[Article V of Agreements] (Emphasis Added.)

PETITIONERS' STATEMENTS OF POINTS IN BRIEFS
BEFORE KENTUCKY APPELLATE COURTS

Court of Appeals

- I. Whether the court erred in granting summary judgment to the appellees on the basis of consent, waiver or estoppel.
- II. Whether the language on appellants' plats permits apportionment.
- III. The court abused its discretion by granting summary judgment to appellees prior to the scheduled filing of appellants' reply briefs.
- IV. Issues not addressed in the court's orders of summary judgment.
- V. The trial court should have granted summary judgment against each appellee.

Supreme Court

- I. Did the court below err in finding Movants' easements apportionable to CATV usage?
- II. Did the court below err in finding that the use of easements by CATV companies places no additional burdens on movants?
- III. Did the court below err in declaring CATV operators to be public utilities?
- IV. Did the court below err in giving precedent value to the California case of *Salvaty v. Falcon Cablevision*?
- V. Did the trial court err in granting summary judgment to respondents on the basis of consent, waiver or estoppel?
- VI. Did the trial court abuse its discretion by granting summary judgment to respondents prior to scheduled filing of movants' reply briefs?
- VII. This court should grant summary judgment to movants against each respondent.